IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 594

JOHN T. GOJACK,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit affirming petitioner's conviction for violating R. S. §102 as amended (2 U. S. C. §192).

Opinions Below

The opinion of the court below which affirmed petitioner's conviction is as yet unreported and appears in Appendix C of this petition. The opinion of the lower court confirming petitioner's first conviction appears at 280 F. 2d 678 (C. A. D. C.), reversed *sub nom. Russell* v. *United States,* 369 U. S. 749.

Jurisdiction

The judgment of the Court of Appeals was entered on May 27, 1965 (Appendix A, *infra*). A petition for rehearing was denied on July 23, 1965 (Appendix B, *infra*). On July 30, 1965 the time in which to file a petition for writ of certiorari was extended to and including September 21, 1965. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. §1254 (1).

Constitutional and Statutory Provisions and Rules Involved

These are reproduced in Appendix D, *infra*.

Questions Presented

1. Was the indictment in this case insufficient because it failed to specify the authority of the subcommittee of the House Committee on Un-American Activities to conduct the investigation into the subject allegedly under inquiry?

2. Was the conviction invalid because there was no proof at the trial that the subcommittee which interrogated petitioner had authority to conduct the investigation into the subject allegedly under inquiry?

3. Was the conviction invalid because there was no proof that the investigation was authorized by a majority of the full Committee as required by Rule I of the Committee's Rules?

4. Was the subcommittee inquiry in this case an unconstitutional exercise of a non-legislative power to expose individuals and organizations to public criticism and reprisals as an end in itself?

5. Was invasion of petitioner's First Amendment rights and his right to privacy justified by the public interest that would have been served had he answered the questions relating to his political beliefs and associations?

6. Whether, in view of the vagueness of the Committee's authorizing statute and the Committee's announced purpose to expose him and the other circumstances of the case, the pertinence of the questions which petitioner declined to answer in a matter under inquiry was "made to appear with undisputable clarity" within the meaning of *Watkins* v. *United States,* 354 U. S. 178, 214-215.

7. Was petitioner clearly and timely apprised whether the grounds for his objections to answering the questions put by the subcommittee were accepted or rejected, as required by *Quinn* v. *United States,* 349 U. S. 155?

8. Whether the statute creating the Committee and defining its power is unconstitutional on its face or as applied in this case in that

(a) it exceeds the legislative power of Congress;

(b) it is too vague and indefinite;

(c) it abridges rights secured by the First Amendment;

(d) it violates the constitutional principle of separation of powers.

9. Whether the entire proceeding resulting in petitioner's conviction is unconstitutional as a Bill of Attainder within the prohibition of Article I, Section 9, Clause 3 of the Constitution.

Statement of the Case

A. The Proceedings Before the Committee

On November 19, 1954, Representative Francis E. Walter announced what the aims of the contemplated House Committee on Un-American Activities (hereinafter referred to as the "Committee") would be when he assumed its chairmanship in January of the next year at the commencement of the 84th Congress (R. 253, 276-279, 247-248):

> "Rep. Francis E. Walter (D. Pa.) who will take charge in the new Congress of the House activities against Communists and their sympathizers, has a new plan for driving Reds out of important industries. He said today he plans to hold large public hearings in industrial communities where subversives are known to be operating, and to give known or suspected commies a chance in a full glare of publicity to deny or affirm their connection with a revolutionary conspiracy—or to take shelter behind constitutional amendments.
>
> " 'By this means,' he said, 'active communists will be exposed before their neighbors and fellow workers, and I have every confidence that the loyal Americans who work with them will do the rest of the job.' "
>
> • • • • •
>
> "Hearings of a similar nature have been held in local areas, but Rep. Walter wants to make them bigger, with the public being urged as well as invited to attend."
>
> " 'We will force these people we know to be Communists to appear by the power of subpoena,' Rep. Walter said,

'and will demonstrate to their fellow workers that they are part of a foreign conspiracy.'" [1]

The Committee was created and activated by House Resolution 5, passed on January 5, 1955 (*Hearings*, p. VI).[2] On February 9, 1955, the Committee held a meeting, the minutes of which record the following action relevant to this case (R. 12,272; Gov't Ex. 8):

• • • • •

Mr. Scherer moved that David Mates and John Gojack be subpoenaed to appear before a Subcommittee of the Committee on Internal Security [sic] in open hearing at Fort Wayne, Indiana; and that a Dr. Scharfman be subpoenaed to appear in executive session at Fort Wayne, Indiana. The Chairman then designated Mr. Moulder, Mr. Doyle, and Mr. Scherer as a subcommittee to conduct the hearings in Fort Wayne, Indiana, and set the time at February 21, 1955.

• • • • •

The above quoted decision to subpoena petitioner, then an officer of the United Electrical, Radio and Machine Workers of America (UE) (referred to hereinafter as "the Union") before a "subcommittee of the Committee on Internal Security," is the first entry in the Committee's records purportedly dealing with the hearing at which petitioner ultimately appeared (R. 182-183). The February 9 decision to subpoena petitioner without reference to a duly

[1] The Government did not contest the authenticity of this quotation (R. 247-248, 276-279).

[2] This is a reference to the entire hearings which appear in the record as Government Exhibit 12, reprinted under the title, "Investigation of Communist Activities in the Fort Wayne, Ind. Area."

authorized investigation into a legislative subject matter also scheduled the very first Committee hearings in 1955, following Chairman Walter's announcement of a "new plan" described above, to expose "active Communists" by forcing them "to appear by the power of subpoena."[3]

While the minutes themselves do not reflect the fact that Congressman Scherer's motion to subpoena petitioner was approved, the record shows that on February 9, 1955, the day of the Committee meeting, a newspaper in Fort Wayne, where the hearings were scheduled to be held, printed a story quoting a statement made by the Chairman that petitioner would be called to testify before the Committee in Fort Wayne (R. 126, 169-170, 178-179). When the announcement was made, the subpoena had not even been issued: the subpoena was issued on February 10 and petitioner was not served until February 15 (R. 174-175).

Because the proceedings might affect the outcome of a National Labor Relations Board election among the employees of the Magnavox Company, scheduled for February 24, in Fort Wayne, many—including petitioner—protested on behalf of the Union (R. 171; *Hearings*, pp. 62-63). Petitioner's protest also charged that, three days before the public announcement of the hearing, Mr. George McClaren, the labor relations director of the Magnavox Company, whose employees were involved in the election, announced to the employees that petitioner would be subpoenaed *(Ibid.)*.

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[3] See *Supplement to Cumulative Index to Publications of the Committee on Un-American Activities*, 1955-1956, 84th Cong., p. 1; *Congressional Investigations of Communism and Subversive Activities*, Summary-Index, 1918-1956, compiled by Senate Committee on Government Operations, 84th Cong., 2d Sess., p. 252.

On February 14, a representative of the Union sought a postponement of the proceedings because of the pendency of the election (R. 156). The Chairman called in the press while this application was being made and announced in the course of a recorded hearing that "all of us are interested in seeing your Union go out of business, because we do not feel it is good for the United States" (R. 158, 164). Further remarks antagonistic to the Union were made by Chairman Walter and by Congressman Moulder, who was also present (R. 153-154, 163-167).

On February 15, a Fort Wayne newspaper printed a boldly-headlined story (R. 281), "House Un-American (sic) Committee Wants UE 'Out of Business'." The story under the by-line of a reporter present at the hearing called by Chairman Walter (R. 151-152), states, "Chairman Francis Walter (D-Pa.) and Rep. Morgan Moulder (D-Mo.), both declared the committee should try to break the hold of the Union on defense plants" (R. 282). Thus an application for adjournment made to protect the Union from the prejudicial impact of the Committee's planned hearings resulted in a further attack on it by the Committee.

On February 18, the hearing was adjourned until February 28 (R. 18-19). On February 22, two days before the election, the Chairman again attacked the Union—this time on the floor of Congress (101 C. R. 1906, 84th Cong. 1st Sess.). He called for the defeat of the Union in the collective bargaining election, complained that telegrams and letters demanding cancellation of the hearings were subversively inspired and stated that the "postponement was agreed to very reluctantly and only after it was feared that false and malicious charges against the committee by the

UE might result in this communist-dominated union continuing as the bargaining agent in this vital defense plant."

On February 23, the Committee discussed the Fort Wayne hearings at a meeting (Gov't Ex. 7; R. 273-275). The minutes of this meeting, which are referred to in the indictment (R. 1), like the minutes of February 9, contain no reference to a proposed subject matter for investigation by the subcommittee but merely record the fact that the hearings had been continued until February 28 (R. 275). There are no other entries of any kind in the Committee's records for the entire year 1955, approving an investigation into the subject matter of the hearings (Rule I, *infra*, p. 42), authorizing the hearings or delegating to the subcommittee a subject matter for investigation. It was conceded at the trial that the minutes of February 9 and 23 constitute the totality of the Committee's entries on the subject of the Fort Wayne hearings (R. 182-183, 261-262).[4]

Since the adjourned hearings were transferred to Washington, a second subpoena was issued on February 23 (R. 19). And again before the issuance of the subpoena, a local newspaper was made aware of its intended issuance as well as the exposure purpose of the hearing. The *St. Joseph Herald-Press,* a newspaper in St. Joseph, Michigan, where the Union functioned as the collective bargaining agent for the employees of the Whirlpool Company, on February 21 printed a statement directly quoting the Committee Chairman, the accuracy of which is uncontested (R. 276-279),

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[4] Rule XI, par. 26 of the Rules of the House of Representatives provides: "(b) Each Committee shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded."

that the hearing would expose petitioner and another subpoenaed witness as "card carrying Communists" and that, "the rest is up to the community" (R. 283-285). The story under a headline reading in part, "Congressman Out To Prove UE Officials Card-Carrying Commies", went on to point out that "the hearing will precede by three days the N.L.R.B. representative election at Whirlpool". And, again, it directly and accurately (R. 276-279) quoted the Chairman that "all of us [on the Committee] are interested in your Union going out of business because it is not good for the United States" (R. 284-285). At the commencement of the hearings, and before the first witness was sworn, the subcommittee Chairman announced that testimony would be considered (*Hearings*, p. 19) "relating to Communist Party activities within the field of labor, the methods used by the Communist Party to infiltrate labor organizations, and the dissemination of Communist Party propaganda." The record does not show that petitioner who was the third witness was present when the statement was made.[5]

Before any testimony was received, petitioner's counsel filed a motion, to which were appended the two newspaper accounts referred to above, objecting to the hearings on the following grounds (*Hearings*, p. 20; R. 280-281):

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[5] The Government has pointed to the fact that petitioner objected to certain questions asked of the first witness (*Hearings*, p. 72). But that is hardly proof that he heard Congressman Moulder's statement, especially since the questions to which we referred were asked long after the hearings commenced (R. 129-134). The Government introduced evidence that petitioner was seen conferring with the first witness prior to the opening of the hearing and that he was not observed leaving the hearing. But there was no testimony that he was actually present when Congressman Moulder made his initial statement about the scope of the hearing (R. 139-148).

"1. The committee is not engaged in a legislative investigation for a *bona fide* legislative purpose. This committee is limited under Article I, Section 1 of the United States Constitution to the exercise of legislative powers. The chairman of the committee has previously announced as is shown by the newspaper clippings attached hereto that the purpose of the hearing is to force the United Electrical, Radio and Machine Workers of America (UE) 'out of business' and that with respect to the movants Gojack and Jacobs 'to bring out the facts that they are card carrying Communists. The rest is up to the community.'

This purpose is not legislative in character and hence is outside the committee's powers.

"2. If the committee seeks to inquire into activities of a criminal nature, no specific charges have been furnished the movants and no evidence has been offered that they have violated any law.

In any event, the power to inquire into crime is one which is confided exclusively to courts and grand juries under Article I, Section 8 of the Constitution.

"3. The purpose of breaking a union is not one which is authorized by the committee's basic resolution, Public Law 601.

"4. Even if such a purpose were authorized by the committee's basic resolution, the resolution as so construed and applied would constitute a violation of the free speech and assembly guarantees of the First Amendment to the Constitution.

"5. The committee's basic resolution is in any event unconstitutional because no person can determine from it the boundaries of the committee's power.

"6. The Committee intends, as its Chairman has announced, to exact compulsory disclosures of movants' political beliefs and affiliations. The First Amendment forbids this particularly where as here there is no overriding legislative justification for such inquiry."

The motion, filed on behalf of the first three witnesses, including petitioner, was received by the subcommittee with the comment (*Hearings*, p. 20) that "whatever action the Committee desires to take on it, we will take".

Counsel then asked whether the motion would be physically incorporated in the record and was told (*ibid.*) that "we will decide that question after we have examined the motion." Counsel thereupon filed two copies of the motion with the Committee and the first witness, on whose behalf the motion was filed, was thereupon sworn.

When petitioner was sworn he attempted to state orally the gist of the objections filed in the motion (*Hearings*, p. 71) but was interrupted by the Chairman who told him that he was not permitted to "make an opening statement preceding the testimony you are about to give." The witness continued to try to get into the record the grounds of his objections, but was again charged with violating the rules of the Committee. He stated he was merely seeking to explain his position (*ibid.*). Again he was told that he could not state his objections prior to his interrogation (*Hearings*, pp. 71-72). When the witness made a fourth attempt to present to the Committee the substance of the objections contained in the motion he was interrupted by the Chairman and told that his conduct was "not tolerated by the committee" (*Hearings*, p. 72).

After answering a few preliminary questions, the witness tried for a fifth time to present to the Committee the objections which had been presented in the motion (*Hearings*, p. 72): "Before I answer that question I want to explain that this is not a legislative investigation for a bona fide legislative purpose." But he was again rebuked for violating Rule IX of the Committee's rules which requires that copies of prepared or written statements be filed in advance with the Counsel of the Committee (*ibid.*).

Thereafter the witness repeatedly sought to place in the record, in explaining the grounds for his refusal to answer questions, some of the objections which had been advanced in the motion. However, he was systematically interrupted by the Committee members who prevented him from completing his objections (*Hearings*, pp. 72, 84, 86, 87, 106, 109) and who were concerned only with establishing, for purposes of perfecting a contempt case,* that the witness had not pleaded the Fifth Amendment (*ibid.*). After petitioner had declined to answer the questions which gave rise to the indictment, the subcommittee Chairman announced (*Hearings*, p. 155; R. 114), that at the time the motion had been filed, "the members of the subcommittee unanimously voted to overrule the objections and the motion to vacate subpoenas. Therefore, I want the record to show that at that time, *nunc pro tunc*, the objections and the motion to vacate the subpoenas are overruled."

Petitioner was subjected to an unusually comprehensive probe of his life—both public and private. He was asked not only the conventional questions about his politics, but

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*At the close of petitioner's testimony, the subcommittee voted to recommend that he be cited for contempt (*Hearings*, p. 156).

about his employment since 1935 (*Hearings*, pp. 73-79), his draft status in World War II (*Hearings*, pp. 81-83) and whether he had falsified a claim to a high school education (*Hearings*, pp. 135-138).

Petitioner responded to most of the questions—about five hundred in number—but declined to answer six questions which gave rise to the indictment, both on First Amendment grounds and on the ground that the purpose of the hearing was an illegal one, exposure (*Hearings*, pp. 84, 86, 89, 102, 103, 104-105). In response to one question, the witness protested that (*Hearings*, p. 135), "I don't think the law under which this Committee operates was set up for exposure purposes. My understanding is that that is what the courts are for, to expose people." Congressman Scherer replied (*ibid.*), "Their job is to judge, not to expose. It is the job of this Committee to expose Communists. That is one of its primary duties, to expose Communists and the nature of the infiltration of the Communist conspiracy in every activity and agency of American life, which includes labor unions."

In answer to questions about whether he was a Communist, petitioner pointed to the fact that beginning in 1949 he had signed affidavits, pursuant to Section 9(h) of the Taft-Hartley Act, that he was neither a member of, nor affiliated with the Communist Party and that he neither believed in, was a member of, nor supported any organization dedicated to the overthrow of the United States Government by force or by any illegal or unconstitutional methods (*Hearings*, pp. 84, 88; R. 63-64).

B. Judicial Proceedings

1. *The District Court*

Petitioner was indicted in December 1955 on a nine-count indictment under the contempt statute. This indictment with its six surviving counts was dismissed by this Court on May 21, 1962, in *Russell* v. *United States*, 369 U. S. 744, on the ground that it failed to specify the matter under inquiry before the Committee.

Petitioner was reindicted under the contempt statute (Title 2, U. S. C. §192), on September 4, 1962 in a six-count indictment based on refusal to answer the following questions (R. 1-3):

1. Are you now a member of the Communist Party?

2. You have left us under the impression at this point that by reading the newspapers you knew that Johnson was chairman of the Communist Party of Indiana and I am asking you if that is the only way you knew Johnson.

3. Mr. Gojack, did Mr. Elmer Johnson or Mr. Aron appear and address a group of people when you were present?

4. May I ask the witness, do you know whether or not Russell Nixon is a member of the Communist Party?

5. Did you take active part in the peace pilgrimage to Washington which was organized by one of the "front" organizations known as the American Peace Crusade?

6. What method was used to get you as an original sponsor? [That is, original sponsor of the American Peace Crusade.]

Petitioner moved to dismiss the indictment on a number of grounds, including its failure to state facts constituting an offense against the United States and the fact that it was not found by a sufficient number of qualified and unbiased grand jurors. Petitioner also moved separately for a preliminary hearing on the qualifications of the grand jurors who indicted him (R. 4-9). The motions were denied (R. 10).

The Government supplemented the record of the first trial with documents (Gov't Exs. 5 and 7; R. 270-275) dealing exhaustively with the Committee's internal consideration of the hearings. Certain materials in support of petitioner's contentions that the hearing was conducted to expose and injure petitioner (J. A. 196-254), which had been excluded from evidence at the first trial, were admitted at the second trial when the Government withdrew its objections. Also admitted was expert testimony (R. 254-260, 277; see record in *Silber* v. *United States*, 370 U. S. 717, pp. 94-96, 97-118) in support of petitioner's contention that the individual and public interests involved in protecting the rights of free speech and assembly and the right of privacy outweighed the public interest in securing answers to the questions put to him.

Frank Tavenner, the Committee's counsel and the Government's principal witness, testified that in 1951 the Committee had heard testimony that the entire Union was saturated with Communists (R. 20-21). He also testified that in July 1953, another witness offered the information that a group of Union organizers (in a District other than petitioner's) were Communists (R. 21-22). No testimony was adduced that the Committee had information that petitioner was a "card carrying Communist," to use Chairman Walter's words, or any other kind of Communist.

Mr. Tavenner further testified (R. 26-27) that in 1947 Aron and Johnson (Indictment, Counts 2 and 3) had been identified as Communists before the Committee. But no testimony was adduced that the Committee had any basis for linking petitioner politically with these individuals. Similar testimony was presented that the individual (Russell Nixon) referred to in Count 4 had been identified as a Communist (R. 38-39). The Government further showed that petitioner—together with other Vice-Presidents of the Union—received a letter from Nixon with an enclosure of a document calling for peace addressed to the Union, from the Metal Workers of Paris (R. 40-53). Finally, the Committee adduced evidence that the American Peace Crusade had, in 1951, been cited—by the Committee itself—as a "front organization" (R. 27-28), and that petitioner was one of its sponsors (R. 30-31).

Petitioner introduced evidence to show that he had been called for the purpose of exposure only; that exposure was reflected in the Committee's activities through the years, and that it was the characteristic way in which the Committee exercised its jurisdiction (R. 184-245). It was stipulated that, for every year prior to the hearing since 1949, petitioner had filed non-Communist affidavits stating under oath the disclaimer referred to above (R. 63-64).

Petitioner also introduced evidence that Labor Relations Director McClaren of the Magnavox Company had, during the period when the Union had been the collective bargaining agent for the Company's employees, obtained from the Committee material contained in petitioner's dossier while he was an official of the Union, and had circulated it among the employees (R. 184-196, 287-295).

The trial court in upholding the indictment against petitioner's claim that it lacked a specification of the subcom-

mittee's authorization to investigate the matter alleged to be under inquiry, ruled (R. 149) that its mandate was adequately spelled out (1) by the fact that the Legislative Reorganization Act and House Resolution 5 (both referred to in the indictment) vest the authority of full Committee in its subcommittees; (2) by the recital of the authorization to subpoena petitioner and (3) by the particularization of the matter under inquiry as announced by Chairman Moulder at the hearing.

It found in the minutes of the Committee meetings, referred to above, evidence that the full Committee had complied with its Rule I, which requires approval of an investigation by a majority of the Committee (R. 150). It concluded that the hearing had a legislative purpose and that the interest in requiring petitioner to respond to the questions outweighed the interest in free speech and privacy (R. 263-266). Petitioner was adjudged guilty and sentenced to three months' imprisonment and fined $200 (R. 11).

2. *The Court of Appeals*

The Court of Appeals affirmed the conviction in a *per curiam* opinion (Appendix C) which specifically rejected some of petitioner's contentions and ignored the rest. The court ruled that there was "one serious question presented by this record" (*infra* p. 36), the failure of the subcommittee to make a timely ruling on the objections which petitioner had urged at the commencement of the hearings. However, the court ruled that it was "not disposed to consider the matter" in view of the fact that it had not been urged as a ground for reversal although it had been referred to in another related action. The concurring judge found no merit in the majority's reservations. The petition for rehearing squarely raising the issue adverted to by the court below was denied.

Reasons for Granting the Writ

1. The precise issue presented here—whether an indictment for contempt under Title 2, Section 192 in connection with a hearing involving the Committee must allege the authority of the panel delegated to conduct the investigation—was carefully weighed by the Court of Appeals for the Second Circuit in *United States* v. *Seeger*, 303 F. 2d 478. The court applied the requirement of the Sixth Amendment that the accused "be informed of the nature and cause of the accusation" and ruled that a conviction for violation of Title 2, Section 192 cannot be sustained unless it appears from the indictment that the subcommittee was duly empowered to conduct the investigation and that the inquiry was within the scope and the grant of authority.

In that case, in contrast to and in direct conflict with this one, the indictment did recite the fact that the full committee had "directed that an investigation be conducted of Communist infiltration in the field of entertainment in New York." 303 F. 2d, fn. 5 at p. 481. The court nevertheless adopted the defendant's contention and held that "the indictment was defective because it had failed to properly allege the authority of the subcommittee to conduct the hearings in issue and to set forth the basis of that authority accurately" (*supra*, at p. 481). To the same effect see *United States* v. *Lamont*, 236 F. 2d 312 (C. A. 2), affirming 18 F. R. D. 34 (S. D. N. Y.).

Moreover the *Russell* case, 369 U. S. 749, requires a statement of the authorized mission of the subcommittee. The *Russell* case ruled that the subject under inquiry must be set forth in the indictment to permit a determination of pertinency. The instant indictment's reference to a subject under inquiry is to the announcement made by the sub-

committee Chairman Moulder at the commencement of the hearings (*supra*, p. 9). But such an announcement is hardly an authoritative statement of the subcommittee's delegation of authority. Congressman Moulder's statement may perhaps have reflected a Committee authorization, or it may have been an improvisation. The questions propounded at the hearing may have been pertinent to the announced subject-matter but not to the subcommittee's authorization. The *Russell* case obviously requires that the indictment enlighten the defendant and the court not merely as to the matter under inquiry as announced at the hearing, but also as to the matter confided to the subcommittee in the first place. The former allegation might be adequate to frame the pertinency issue in the due process sense, but an allegation of the subcommittee's authorized mission is indispensable to a resolution of the issue of statutory pertinency.[7] Cf. *Deutch* v. *United States*, 367 U. S. 456, 468; *Watkins* v. *United States*, 354 U. S. 178, 204; see also *United States* v. *Lamont*, 18 F. R. D., *supra* (at p. 35); also *Sacher* v. *United States*, 356 U. S. 576, 577, and *United States* v. *Orman*, 207 F. 2d 148, 153 (C. A. 3).

Quite apart from questions of jurisdiction and pertinency, allegations of subcommittee authority are necessary to permit an initial determination as to whether, in a hearing such as this of more restricted scope than the authorizing resolution, the authority exercised by the subcommittee conforms with the authority delegated to it. Just as full "committees are restricted to the missions dele-

[7] We think it significant that all the indictments referred to in the *Russell* case, *supra*, at 754, footnote 7, which specify a matter under inquiry set forth the matter under inquiry as delegated by the full Committee. And the indictments in the post-*Russell*, *Silber* and *Grumman* cases in the District of Columbia Circuit (Criminal Nos. 822-62, 823-62, September 4, 1962 grand jury) also specify the subcommittee's mandate.

gated to them" (*Watkins* v. *United States, supra,* at p. 206), so subcommittees are restricted to their delegated authority.

The authorization for the investigation recited in the indictment is the Committee's charter (H. Res. 5 of January 5, 1955) which this Court has held (*Watkins, supra,* at 205) is too broad and vague to satisfy the demands for precision made by the First Amendment. It should not be necessary for a defendant or a court to guess or assume that the full Committee has authoritatively glossed its resolution (compare *Barenblatt* v. *United States,* 360 U. S. 109, 121) so as to cure its infirmities.[8]

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[8] At least since the *Watkins* case the Committee's subcommittees routinely recite their delegated authority to probe the subjects under inquiry. See, for example, the opening statements made by the Chairmen in the following hearings held from the 85th to the 88th Congress:

Investigation of Communist Activities in the Buffalo, N. Y., Area—Part I, October 2, 1957;

Investigation of Communist Penetration of Communications Facilities—Part 1, July 17, 1957;

Investigation of Communism in the Metropolitan Music School, Inc., and Related Fields—Part 1, April 9, 1957;

Investigation of Communist Infiltration and Propaganda Activities in Basic Industry (Gary, Ind., Area), Monday, February 10, 1958;

Investigation of Communist Activities in the New England Area—Part 1, Tuesday, March 18, 1958;

Communist Infiltration and Activities in Newark, N. J., September 3, 1958;

Passport Security—Part 1 (Testimony of Harry R. Bridges), April 21, 1959;

Communist Infiltration of Vital Industries and Current Communist Techniques in the Chicago, Ill., Area, May 5, 1959;

Western Section of the Southern California District of the Communist Party, Part 1, October 20, 1959;

Communist Outlets for the Distribution of Soviet Propaganda in the United States, Part 1, May 9, 1962;

Communist Activities in the Peace Movement, December 11, 1962;

Assistance to Foreign Communist Governments, March 6, 1963.

2. A separate and distinct conflict with *Seeger* also requires review of the failure here to prove the subcommittee's delegation at the trial. See *Seeger, supra,* at p. 487 (concurring opinion). The omission of the subcommittee's delegated authority in the present indictment, after this court dismissed the first indictment of petitioner for failure to allege the subject under inquiry (*Russell* v. *United States, supra*) was not the result of choice or accident[9] but was dictated by lack of evidence of the delegation. The trial record shows proof only of the Committee's and subcommittee's general power as conferred by the House resolution to investigate the broad areas described in the resolution but not the subcommittee's authorization to investigate the limited subject it claimed it was investigating. Even if the indictment was adequate, the proof was fatally defective. It is the authorization by the full Committee which defines the authority of the subcommittee and establishes the legislative purpose of the hearing by deciding that an inquiry would aid Congress in the performance of its legislative function. A contempt is not committed unless the proper authority of the subcommittee is established by proof not available here. *Seeger, supra,* at 487.

3. The Court has noted that especially in investigations touching on beliefs, expressions or associations "procedures which prevent the separation of power from responsibility" cannot be lightly disregarded. *Watkins* v. *United States,* 354 U. S. 178, 197, 215.

Rule I of the Committee's rules (*infra,* p. 42) is one of those rules of congressional committees which seek to

[9] The grand jury which indicted petitioner (R. 1) returned indictments in the *Grumman* and *Silber* cases which did specify the delegated authority of the subcommittee. See note 7, *supra.*

join power and responsibility.[9a] It requires that before an investigation is undertaken, a majority of the Committee, in this case, five members, must approve. Here there is not an iota of evidence to show compliance with the rule. Nor could prior approval be inferred from what occurred afterwards. The witness has a right to have the full committee responsibly determine in advance whether or not to conduct the investigation. Compare *Yellin* v. *United States,* 374 U. S. 109, 124.

The failure of the Committee to conform to its own rules is an issue which requires review especially since the rule involved is such an important bulwark against abuse of investigative power. Moreover, the opportunity afforded the Court to give guidance in this area is unusually favorable because this issue relates in important respects to the delegation issues already discussed.

4. The defects in the indictment and proof[10] and the non-compliance with Rule I of the Committee, referred to above, eliminate the basis for any claim that the hearing had a legislative purpose. In addition there is a unique and, we submit, highly impressive affirmative chain of proof

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[9a] Compare Rule I, Senate Government Operations Committee; Rule 8 House Government Operations Committee; Rule 1 House Ways and Means Revenue Subcommittee. See also report of the Subcommittee on Rules, Senate Committee on Rules and Administration, "Rules of Procedure for Senate Investigating Committees" (83rd Congress, 2d Session) p. 15; Hearings before the Subcommittee on Rules, "Rules of Procedure for Senate Investigating Committees" (83rd Congress, 2d Session, pp. 136, 141-142, 261) (testimony of Harold H. Velde) and 291 (testimony of Robert Kunzig).

[10] See *United States* v. *Lamont,* 18 F. R. D. 34 at 36:

> "Nor is it an answer to suggest that a presumption of regularity supports the committee's purported authority to act since that presumption presupposes a prior grant of authority."

that the purpose of the hearing was to expose and injure petitioner and the Union.

This was the first hearing conducted pursuant to a new plan to engage in bigger and better exposure hearings with a view to stimulating community reprisals. The entire record shows how this plan was executed. Petitioner was subpoenaed twice—his first hearing was postponed. Information was leaked to the local press in two different communities before the subpoenas were issued announcing that they would be issued. The Personnel Manager of the plant in which petitioner's Union was faced with an election was able to announce three days before the issuance of the subpoena that a subpoena would be issued. Chairman Walter expressly told one local newspaper in advance of the hearings that the Committee would demonstrate that petitioner was a "card-carrying Communist" and that "the rest" would be "up to the community." Both newspapers quoted the Chairman's statement that the Committee was interested in breaking petitioner's Union, an objective which was reiterated by the Chairman on the floor of Congress.

The subcommittee which presided over petitioner's hearing was informed of the Chairman's announcements and actions, but did not disavow them. The exposure purpose thus revealed in the entire record is reinforced by the fact that the Committee produced no evidence to support its advance claim that the petitioner was a "card carrying Communist."

The court below in rejecting our exposure contention relied on this Court's decision in *Barenblatt* v. *United States, supra.* It seems to us that the court below has erroneously construed *Barenblatt* to erect an impregnable wall of immunity from challenge on exposure grounds. At least where investigation of Communism is involved the pre-

sumption of legislative purpose appears to be, under the lower Court's view of *Barenblatt*, irrebuttable.

If this Court's strictures[11] against exposure for exposure's sake are not to be reduced to empty verbalism, then the ruling below that this was not an exposure hearing must be reviewed. The presumption which normally shelters a legislative enterprise was overcome, as we have seen, in the very cradle of this "investigation". And whatever force it retained was rebutted by the uncontradicted facts. Compare *United States* v. *Cross*, 170 Fed. Supp. 303, 309-310 (D. D. C.). If petitioner's showing in this case falls short of what is required, then we doubt whether an exposure purpose can be shown in any case, or indeed whether the purpose of the Committee can be viewed as a question of fact at all. There is present here the evidence "that the Subcommittee was attempting to pillory witnesses" found to be lacking in *Barenblatt* (360 U. S. at 134); cf. *Braden* v. *United States*, 365 U. S. 431; *Wilkinson* v. *United States*, 365 U. S. 399.

5. This is a conviction for the exercise of First Amendment rights.[12] However, under the *Barenblatt* case, the vindication of those rights depends upon a balancing of "the

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[11] *Watkins* v. *United States*, *supra*, at 187, 200; *Quinn* v. *United States*, 349 U. S. 155, 160-161; *Barenblatt* v. *United States*, 360 U. S. 109, 133.

[12] The enforced disclosure of affiliation and association is no insignificant or minor rupture in the fabric of our freedoms. The matrix of our entire system for protecting dissent is embedded in the anonymity which an impersonal urbanized culture has made possible. The individual's right to dissent was but an abstraction in a pre-industrialized culture when each man was at the mercy of his neighbor's prejudices. As John P. Roche put it in "American Liberty: An Examination of the 'Tradition of Freedom,' an essay printed in *Aspects of Liberty*, Konvitz and Rossiter (Cornell University Press, 1958) "In a very real sense the very impersonalization of urban life is a condition of freedom; it is quite possible

competing private and public interests at stake in the particular circumstances shown." 360 U. S. at 126. In this case, as in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516, and *Gibson* v. *Florida*, 372 U. S. 539, the "circumstances shown" do not warrant a sacrifice of petitioner's First Amendment freedoms.

Apart from the facts that (1) there was a dubious legislative purpose for the hearings; (2) the Committee already had detailed information in its files about petitioner; and (3) petitioner for the five years prior to the date of his appearance had filed non-Communist affidavits pursuant to the Taft-Hartley Act (*supra*, p. 13), a detailed analysis of the other competing interests involved has led an expert, Professor Thomas I. Emerson of the Yale Law School, to the conclusion that, under circumstances comparable to those present here (*supra*, p. 15):

> "the interests of the Government in obtaining answers to the questions put to this defendant as an aid in developing further legislation to protect internal security are substantially outweighed by the interests of the individual in freedom of speech or silence, as he may prefer, and by the interests of the community in maintaining freedom of political expression and other conditions essential to maintaining an open society."

Invasion of the First Amendment rights of Committee witnesses has come to be mechanically justified on the

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to live differently and believe differently from one's neighbors without their knowing, much less caring, about the deviation." See Nye, *Fettered Freedom* (Michigan State College Press (1959)) for an account of liberty in America in the pre-industrial era.

The goal of the Committee's exposure system—and its counterparts—is nothing more or less than the restoration of the social and economic controls which gave dissent no quarter.

grounds of national security in every investigation involving Communism. But the facts upon which such justifications are based are stale and require authoritative re-evaluation. It is simply a myth that our security is under a threat of internal subversion of such menacing proportions as to require the continuing curtailment of our freedoms for the indefinite future. The fact is that the power of Communism in the United States is now and has for some time been at an extremely low ebb. See Emerson testimony, *supra*. Nor can it be convincingly argued that there is a foreign threat which justifies curtailment of domestic freedoms. The collapse of the myth of a monolithic Communist world, the emergence of polycentrism, the rivalry of the Soviet and Chinese systems and the development of mutually shared goals of co-existence between the United States and the Soviet Union—all of these circumstances condemn as unreal the justifications for restraints on our basic freedoms which have hitherto been advanced. Even in the case of commercial regulations the Court evaluates the reasonableness of a restraint in the light of changed circumstances.[13] Where political freedom is involved we submit it has a duty to do so.

6. This case warrants review because petitioner was denied the protections of *Watkins* v. *United States*, 354 U. S. 178, 208-209. Petitioner had excellent ground for believing that the purpose of the Committee, as announced by the Chairman, was to expose him and to break his Union. He indeed filed objections with the Committee, protesting these announced purposes. His objections thus did not reflect an awareness of a contemplated legitimate subject

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[13] Compare *Block* v. *Hirsh*, 256 U. S. 135 with *Chastleton* v. *Sinclair*, 264 U. S. 543, 547-8 and *Noble State Bank* v. *Haskell*, 219 U. S. 104 with *Abie State Bank* v. *Weaver*, 282 U. S. 675, 772.

under inquiry. He had a right to assume that all of the questions would be pertinent to himself and to an attempt to injure him and his Union rather than to any other subject.

We think that the motion which petitioner filed at the outset of the hearing "triggered" the Committee's responsibility to set out clearly the claimed subject under inquiry. The Committee evidently thought so too for it denied the motion at the end of the hearing, "*nunc pro tunc.*" But this delayed action hardly could cure the failure of the Committee to conform to the requirements of *Watkins*. Nor did the Chairman's announcement at the beginning of the hearing effectively inform petitioner of the matter under inquiry. There is no showing at all in the record that petitioner was present when the announcement was made. It is true his counsel also was counsel for the first witness, but we think that the *Watkins* rule requires that the subject matter of the hearing and its pertinency be communicated to the witness and not to his counsel acting as counsel for another witness.

7. Moreover, the sub-Committee was required to overrule petitioner's objections, as stated in his motion, prior to the time he was forced to give testimony and to apprise him that it had overruled these objections, and to require him to proceed. *Quinn* v. *United States*, 349 U. S. 155; *Emspak* v. *United States*, 349 U. S. 190; *Bart* v. *United States*, 349 U. S. 219; and *Flaxer* v. *United States*, 358 U. S. 147.

The objections were manifestly not frivolous; they were presented in documented fashion and called for some response by the Committee. Not only did the Committee fail

to overrule the objections in the motion, but it prevented the witness from presenting them orally (*supra*, pp. 11-12).

Nor did the Committee's direction to answer specific questions adequately discharge its responsibility, as defined by this Court. The Committee had made it clear (as in the *Bart* case, *supra*), at 233, that it had no intention of ruling on the objections in the motion and petitioner had no way of knowing whether these grounds for his refusal had been considered and rejected. Besides, objections made by the witness to specific questions here were not co-extensive with the grounds urged in the motion. Since the subcommittee was required to communicate to the witness its response to *all* of his objections the fact that it directed him to answer after hearing some of them is no defense to our contention.

Thus, of the six grounds presented in the motion, only two were urged in response to the Count 1 question (*Hearings*, pp. 86-87; R. 74-76); two, in response to the Count 2 question (*Hearings*, pp. 102-104; R. 91-92); one to the Count 3 question (*Hearings*, pp. 106-107; R. 94); one to the Count 4 question (*Hearings*, p. 134; R. 102-3); one to the Count 5 question (*Hearings*, p. 145; R. 104); and "for the reasons previously stated" to the Count 6 question (*Hearings*, pp. 149-150; R. 108-109).

As the Court below noted, this is a "serious question" (*infra*, p. 36) and it warrants review.[14]

8. Contentions repeatedly submitted to the courts challenging the Committee's mandate as violative of the First Amendment must also be reconsidered in the light of

[14] The issue was suggested on the appeal but not explicitly raised until the petition for rehearing was filed. Compare *Silber* v. *United States*, 370 U. S. 717.

changed circumstances. What might have been constitutionally permissible in a Congressional enactment construed and applied in a time of political tension (compare *Ex parte Endo*, 323 U. S. 283 with *Harabayashi* v. *United States*, 320 U. S. 81) may not, in a calmer time, meet the strict requirements of the First Amendment. In *Barenblatt, supra*, this Court ruled that the Committee's resolution was not too vague to meet First Amendment standards. But the Committee itself is not sure what its resolution means. Thus, it was only after long hesitation and considerable reservation and doubt as to its authority that it decided to undertake a probe of the Ku Klux Klan.[15] As recently as 1961, the late Chairman Walter stated that the activities of such organizations are excluded from the Committee's jurisdiction.[16]

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[15] The investigation of the Ku Klux Klan was demanded by the Committee member Weltner on February 1, 1965. See 111 Cong. Rec. 1592 Feb. 1, 1965 (Daily Edition). On March 30th, 1965, after a prolonged preliminary inquiry, an investigation of the Klan was approved by the Committee. The debate on the resolution authorizing the investigation appears at 111 Cong. Rec., pp. 7740, 7750, April 14, 1965 (Daily Edition). See, also, New York Times, March 31, 1965; March 29th, 1965; February 26, 1965.

[16] In a telecast ("Youth Wants to Know") on January 28, 1961, Walter gave an interrogator the following account of the limitations on the Committee's jurisdiction:

"Question: Sir, for our own information, could you tell us just what is considered un-American, by your Committee?

"Representative Walter: Well, any activity that strikes at the basic concept of our Republic.

"Question: Sir, don't you agree that such subversive organizations as the American Nazi Party and Ku Klux Klan constitute a threat to the liberties of Americans?

"Representative Walter: I don't think so. Actually, they haven't engaged in any activity on behalf of a foreign power and that, of course, is the big difference.

"Question: But, sir, don't you believe that the suppression of minorities is against the Constitution of the United States?

"Representative Walter: Of course, it is, but it is not within the jurisdiction of the Committee on Un-American Activities

Moreover, it seems to us that the ruling in *Barenblatt*, on vagueness of the Committee's mandate had been severely undermined by *Baggett* v. *Bullitt*, 377 U. S. 360 and *Dombrowski* v. *Pfister*, 380 U. S. 479.

9. The entire Committee proceeding against petitioner, culminating in his conviction, constituted an attempted non-judicial punishment of petitioner by an adjudication of a sort and by exposure to public hatred and economic and social retaliation which is prohibited as a Bill of Attainder by Article I, Section 9, Clause 3 of the Constitution. *United States* v. *Brown*, 381 U. S. 437; *United States* v. *Lovett*, 328 U. S. 303; *Barenblatt, supra* (dissenting opinions).

CONCLUSION

For the foregoing reasons, it is prayed that the petition for a writ of certiorari be granted.

Respectfully submitted,

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to make inquiries into that field. Our inquiries are limited by the statute creating the Committee, and this, of course, is Communism and Communist activity."

APPENDIX A

Filed May 27, 1965

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,348

September Term, 1964.

Criminal 821-62

JOHN T. GOJACK,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Columbia

Before:

BAZELON, *Chief Judge,* and
BURGER and WRIGHT, *Circuit Judges.*

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: May 27 1965

Separate opinion by Circuit Judge Burger concurring in the result.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,348

September Term, 1964

Crim. No. 821-62

JOHN T. GOJACK,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

Before:

BAZELON, *Chief Judge,*
BURGER and WRIGHT, *Circuit Judges,* in Chambers.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the court that the aforesaid petition is denied.

Per Curiam.

Dated: Jul. 23, 1965

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18348

JOHN T. GOJACK,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Columbia

Decided May 27, 1965

Mr. Frank J. Donner of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Mr. David Rein* was on the brief, for appellant.

Mr. Robert L. Keuch, Attorney, Department of Justice, with whom *Assistant Attorney General Yeagley, Messrs. David C. Acheson,* United States Attorney, and *Kevin T. Maroney,* Attorney, Department of Justice, were on the brief, for appellee. *Mr. Frank Q. Nebeker,* Assistant United States Attorney, also entered an appearance for appellee.

Before:

BAZELON, *Chief Judge,* and
BURGER and WRIGHT, *Circuit Judges.*

PER CURIAM: On February 28 and March 1, 1955, appellant testified at a subcommittee hearing of the House of Rep-

resentatives Committee on Un-American Activities. At that hearing he refused to answer certain questions, for which he was convicted for contempt of Congress.[1] That conviction was reversed by the Supreme Court for insufficiency of the indictment.[2] Appellant was then convicted on a new indictment, which alleged refusal to answer six questions asked by the subcommittee.[3] This appeal followed.

Appellant argues that the subcommittee had no proper legislative purpose and that he was not adequately informed by the subcommittee of the legislative pertinency of its questions. These arguments are foreclosed by *Barenblatt* v. *United States*, 360 U.S. 109 (1959). Appellant further contends that the indictment was insufficient because it did not specifically recite the subcommittee's au-

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[1] 2 U.S.C. §192.

[2] *Sub nom. Russell* v. *United States*, 369 U.S. 749 (1962).

[3] The questions were:

"1. On February 28, 1955. Question: Are you now a member of the Communist Party?

"2. On March 1, 1955. Question: You have left us under the impression at this point that by reading the newspapers you knew that Johnson was chairman of the Communist Party of Indiana and I am asking you if that is the only way you knew Johnson.

"3. On March 1, 1955. Question: Mr. Gojack, did Mr. Elmer Johnson or Mr. Aron ever appear and address a group of people when you were present?

"4. On March 1, 1955. Question: May I ask the witness, do you know whether or not Russell Nixon is a member of the Communist Party?

"5. On March 1, 1955. Question: Did you take active part in the peace pilgrimage to Washington which was organized by one of the 'front' organizations known as the American Peace Crusade?

"6. On March 1, 1955. Question: What method was used to get you as an original sponsor? [That is, original sponsor of the American Peace Crusade.]"

thority to conduct the investigation here, and that there was no adequate proof at trial of the subcommittee's authority. We find no merit in these contentions.

There is one serious question presented by this record which appellant has not alleged as grounds for reversal. At the beginning of the February 28 hearing, appellant's counsel submitted a written motion to the subcommittee contesting its jurisdiction to question appellant.[4] At that time, the subcommittee chairman stated, "You may

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[4] "John Thomas Gojack, . . . having been subpenaed by the House Committee on Un-American Activities for appearance at a hearing on February 28, 1955, respectfully move[s] to vacate the said subpenas and to set aside the hearing on the following grounds:

"1. The Committee is not engaged in a legislative investigation for a bona fide legislative purpose. This Committee is limited under Article I, Section 1 of the United States Constitution to the exercise of legislative powers. The Chairman of the Committee has previously announced as is shown by newspaper clippings attached hereto that the purpose of the hearing is to force the United Electrical, Radio and Machine Workers of America (UE) 'out of business' and that with respect to the movants Gojack, . . . 'to bring out the facts that they are card carrying Communists. The rest is up to the community'.

"2. If the Committee seeks to inquire into activities of a criminal nature, no specific charges have been furnished the movants and no evidence has been offered that they have violated any law.

"In any event, the power to inquire into crime is one which is confided exclusively to courts and grand jurys under Article I Section 3 of the Constitution.

"3. The purpose of breaking a union, is not one which is authorized by the Committee's basic resolution, Public Law 601.

"4. Even if such a purpose were authorized by the Committee's basic resolution, the resolution as so construed and applied would constitute a violation of the free speech and assembly guarantees of the First Amendment to the Constitution.

"5. The Committee's basic resolution is in any event unconstitutional because no person can determine from it the boundaries of the Committee's power.

(footnote continued)

file the motion; and then whatever action the committee desires to take upon it, we will take." No explicit ruling was made on this motion until the conclusion of the March 1 hearing, when the chairman stated:

> [A]t the beginning of the hearings, counsel for John T. Gojack . . . filed a statement of objections to hearing and a motion to vacate the subpoenas. At that time the members of the subcommittee unanimously voted to overrule the objections and the motion to vacate the subpoenas. Therefore, I want the record to show that at that time, nunc pro tunc, the objections and motion to vacate subpoenas are overruled.

This ruling was made after appellant's refusal to answer the questions for which he was here convicted.[5]

Although the subcommittee did specifically direct appellant to answer the questions at issue, its failure specifically to overrule appellant's motion may have left ambiguous whether the subcommittee had considered the objections raised in appellant's motion or whether it was ignorant of them before it directed an answer. "[A] clear disposition of the witness' objection is a prerequisite to prosecution for contempt . . . ." *Quinn* v. *United States*, 349 U.S. 155, 167 (1955). The subcommittee must "advise the witness of [its] position as to his objections . . . [to give him] a clear choice between standing on his objection and com-

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"6. The Committee intends, as its chairman has announced, to exact compulsory disclosure of movants' political beliefs and affiliations. The First Amendment forbids this particularly where as here there is no overriding legislative justification for such inquiry."

[5] After this ruling, appellant refused to answer several questions. He was not indicted for those refusals. Compare *Flaxer* v. *United States*, 358 U.S. 147 (1958).

pliance with a committee ruling." *Bart* v. *United States*, 349 U.S. 219, 223 (1955).[6]

On the previous appeal, this court ruled, "That [appellant's motion] was in fact denied is clear from the fact that [appellant was] . . . called, sworn and queried."[7] It is not clear whether we are bound by that ruling. But since appellant's experienced counsel does not challenge that ruling on this appeal,[8] we are not disposed to consider the matter.

The judgment of the District Court is

Affirmed.

BURGER, *Circuit Judge, concurring in the result*: I cannot agree that the issue concerning denial of Appellant's motion to the Committee is open. The point was not raised to the Committee; it was not raised in the District Court; it was not raised in this court.

The orderly and efficient administration of the business of the courts ought to preclude—and I think it does preclude—a litigant from ignoring a point which is obvious even though not valid only to have it raised sua sponte by a member of the reviewing court.

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[6] During his testimony, appellant attempted repeatedly to state his objections and he was repeatedly interrupted by subcommittee members on the ground that he was "proceeding again to read that prepared statement." The basis for these interruptions was apparently the Committee's rule that "a prepared or written statement" can be read into the record only upon Committee approval at the conclusion of a witness' testimony. The effect of the interruptions may have been, however, to deprive appellant of any opportunity to determine whether the subcommittee was aware of the basis for his objections and whether it overruled those objections.

[7] 108 U. S. App. D. C. 130, 138, 280 F. 2d 678, 685 (1960).

[8] Appellant's brief, at p. 52, does refer to the "retroactive rejection" of his motion, but only to support his argument that the subcommittee did not adequately advise him of the legislative pertinency of its questions.

That the point discussed by the court has no merit is shown by our own holdings that a ruling may be implicit in the conduct of a tribunal. Judge Wright pointed this out in *Cooper* v. *United States*, —— U.S.App.D.C. ——, ——, 337 F.2d 538, 539 (1964), where he articulated the reasons underlying the summary affirmance of the conviction where the District Court proceeded to trial without entering an order or formally ruling on the Defendant's competence to stand trial. "The court did not in terms hold that Cooper was competent. But its ruling to this effect is clear from its actions [in proceeding to trial]."

Appellant here moved to vacate the subpoena and "set aside" the hearing. His objection went to the fact of any questioning at all. To suggest that continuance of the hearing did not dispose of Appellant's motion by denying it is to ignore the realities of the situation. Nor is the rule of the *Quinn* and *Bart* cases, cited by the court, to the contrary. Those cases significantly did not involve express directions to answer such as Gojack here received. See 349 U. S. at 222. Moreover, we expressly held the *Quinn* rule unavailable to Appellant on his former appeal. *Gojack* v. *United States*, 108 U.S.App.D.C. 130, 139, 280 F.2d 678, 687 (1960).

For these reasons I am bound to express my disagreement with the court's discussion of this point.

APPENDIX D

Constitutional and Statutory Provisions and Rules Involved

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the prosecution; * * *"

2 U.S.C. Sec. 192, R.S. 102 (52 Stat. 942), as amended, provides:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee, established by a joint or concurrent resolution of the two Houses of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 812, 823, 828) and House Resolution 5 (84th Congress) provide in pertinent part:

"(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

"RULE XI

"Power & Duties of Committees

"(1) All proposed legislation, messages, petitions, memorials, and other matters related to the subjects listed under the standing committees named below shall be referred to such committees respectively. . . .

* * * * *

"(q) (1) Committee on Un-American Activities.

"(A) Un-American Activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittees, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda

activities in the United States, (ii) the diffu
within the United States of subversive and
American propaganda that is instigated from fore
countries or of a domestic origin and attacks
principle of the form of government as guarant
by our Constitution, and (iii) all other questi
in relation thereto that would aid Congress in
necessary remedial legislation."

Rule 7 (c) F.R. Cr. Proc. provides in pertinent part
follows:

"The indictment or the information shall be a pla
concise and definite written statement of the essent
facts constituting the offense charged. It shall
signed by the attorney for the government. It need n
contain a formal commencement, a formal conclusi
or any other matter not necessary to such statem
Allegations made in one count may be incorporated
reference in another count."

Rule I of the Rules of Procedure of the House Committ
on Un-American Activities provides in pertinent part:

"No major investigation shall be initiated witho
approval of a majority of the Committee."